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No. 362

In the Supreme Court of the United States

OCTOBER TERM, 1960

V. F. BOND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The memorandum of the District Court in relation to reimbursement of the mortgagee for real estate taxes (Pet. 1a-6a) is reported at 172 F. Supp. 759. The memorandum of the District Court dealing with the mortgagee's claim for attorney's fees (Pet. 6a-7a) is not officially reported. The opinions of the Court of Appeals (Pet. 8a-36a) are not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1960. (R. 104.) The petition for a writ of certiorari was filed on August 25, 1960. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the priority of a mortgage over a subsequent federal tax lien extends to local real estate taxes accruing and paid by the mortgagee after the effective date of the federal tax lien.

2. Whether the priority of a mortgage over a subsequent federal tax lien extends to attorney's fees incurred by the mortgagee after the date of the federal tax lien in contesting the priority of the federal tax lien over the mortgagee's claim for reimbursement of local real estate taxes.

STATUTES INVOLVED

The statutes involved, Sections 6321, 6322 and 6323(a) and (b) of the Internal Revenue Code of 1954, and Section 3466 of the Revised Statutes, are set forth in the Appendix, *infra*, pp. 10-12.

STATEMENT

The relevant facts are not in dispute, and are summarized in the opinion of the Court of Appeals (Pet. 9a-11a) as follows:

On December 20, 1955, deficiencies were assessed against the taxpayers for the years 1943 through 1947, totaling $318,832.84, and on the same day deficiencies were assessed against taxpayer, V. F. Bond, for the year 1942 in the amount of something over $18,000. On or about December 20, 1955, notices of such assessments were served upon the taxpayers and demand for payment was made, but taxpayers refused to pay.

On December 21, 1955, notice of lien for each assessment was recorded in the proper county and municipal offices pursuant to the Internal Revenue Code of 1954, Section 6323(a)(1). On July 2, 1957, the assessments had been reduced to judgment.

The complaint filed in this action for foreclosure of the tax liens listed various properties owned by the taxpayers, among them the Arlington Hotel, at Arlington, Virginia, the property involved in this controversy. The United States requested the appointment of a Receiver to take charge of, marshal and liquidate the properties, and prayed *inter alia* that the court determine the validity and priority of all liens and claims and order a foreclosure of the liens of the United States and a sale of the properties.

On November 27, 1957, the District Court found that the United States had valid liens in the principal sum of $357,484.18, plus interest, for the years involved, and that the taxpayers were insolvent. The court then appointed a Custodial Receiver to take charge of the properties of the taxpayers and appointed a Special Master to ascertain and report to

the court the claims against the taxpayers, the value of their properties and the validity and priority of liens on such properties. Pursuant to the recommendations of the Receiver, the Arlington Hotel property was sold for $172,500.

The Arlington Hotel property was subject to a mortgage, executed by taxpayers as mortgagors, securing a loan in the original principal sum of $100,000 made by Perpetual Building Association. This mortgage was recorded on July 15, 1955, some six months prior to the recordation of the notice of federal tax lien. Monthly payments were made by the mortgagors until October 4, 1956, after which no further payments were received by Perpetual.

Under the mortgage each monthly payment was allocated not only to the payment of principal and interest, but a portion, $331, was also set aside in a fund for the payment of taxes accruing against the mortgaged property. The mortgage contained other provisions as follows:

> *It Is Hereby Covenanted*: * * * (2) that any and all taxes and assessments, general or special, now or hereafter assessed against said realty shall be paid when due, * * * (7) that the title to said realty and the record of said title shall be kept free of litigation, infirmity and lien, * * * (10) that any and all disbursements made by the Treasurer [of Perpetual] because of the failure of the grantor to make any payment or do any act required to be made or done, with interest thereon at six percent (6%) per annum, shall be demandable at any time by the Treasurer and, until repaid to the Treasurer, shall be

> deemed to be secured by this Deed of Trust, and (11) that if there shall be any default in the performance of any of the foregoing covenants the Treasurer shall have the right and power to do any one or more of the following: (a) do any act or make any disbursement, in his name or the name of the grantor, which he may deem necessary or proper to protect the lien of this Deed of Trust, * * *.

After default by the mortgagors, Perpetual paid the local real estate taxes assessed for the years 1957 and 1958, which had accrued and had been assessed subsequent to the recordation of the notice of federal tax liens. While a portion of the payment made for 1957 taxes came from the accumulated fund paid and held for this purpose, Perpetual paid from its own funds on August 16, 1957, $4,759.16 for the year 1957 and on August 11, 1958, $4,787.16 for the year 1958. Perpetual claims that it has a lien for those amounts, with interest, by virtue of the provision of the mortgage, and that such lien is prior to the federal tax liens.

The District Court held (Pet. 1a-6a) that Perpetual was entitled to be reimbursed for the real estate taxes before satisfaction of the lien for federal taxes. In a separate unreported memorandum opinion, the court allowed an attorney's fee of $1,000, payable to Perpetual from the proceeds of sale as a cost of liquidating the mortgage, this also to take priority over the federal tax liens. (Pet. 6a-7a.) The Court of Appeals (one judge dissenting) reversed the District Court both as to the real estate taxes and as to the attorney's fee. (Pet. 8a-36a.)

ARGUMENT

These propositions are clear: A lien of the United States for taxes is subordinate to a mortgage lien which is first in point of time; by the same token, the lien of the United States takes precedence over the security interest of a mortgagee arising *subsequent* to the date that the federal lien is perfected. As Section 6323 of the Internal Revenue Code (*infra*, p. 10) declares, the federal tax lien is valid "as against any mortgagee, pledgee, purchaser or judgment creditor" as soon as the requisite notice is filed.

In the instant case, notice of the federal lien was filed in December of 1955. Thereafter, the mortgagee paid local real estate taxes (for the years 1957 and 1958) owed by the United States' debtor (the mortgagor). The sum represented by these payments obviously could not have been a part of the mortgage debt when the federal lien attached. The mortgagee meets this with the assertion that under the contract of mortgage the mortgagee was empowered to pay local real property taxes in order to protect its underlying security. This, however, does not detract from the conclusion that payment of the local taxes by the mortgagee created a new and additional monetary obligation as between mortgagor and mortgagee and that this obligation (as well as the lien to which it gave rise) was junior in point of time to the secured claim of the United States for taxes.[1]

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[1] Note that the municipality's lien for these taxes would itself be inferior to the prior tax lien of the United States. *United States* v. *New Britain*, 347 U. S. 81. Accordingly, as

The mortgagee's contention is essentially one of "relation back." But the fact that the mortgagee had the power, under an earlier instrument, to add to the mortgage debt, does not alter the situation. The crucial date is the date that the power was exercised. In a long line of decisions[2] (which are reviewed in the opinion below, Pet. 14a-22a), this Court has made it unmistakably plain that it will not apply doctrines of "relation back," and that a competing lien asserted against the United States must be (1) prior in point of time and (2) choate.[3] As the Court of Appeals stated (Pet. 22a), this Court has applied the choate-lien test "first in insolvency cases, then in statutory lien cases, and finally in non-statutory contractual lien cases." Since this prin-

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pointed out in *United States* v. *Wasserman*, 257 F. 2d 491, 494-495 (C. A. 1st), the mortgagee's act does not benefit the United States or protect its security interest.

[2] See *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47; *United States* v. *New Britain*, 347 U. S. 81; *United States* v. *Acri*, 348 U. S. 211; *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Scovil*, 348 U. S. 218; *United States* v. *Colotta*, 350 U. S. 808; *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010; *United States* v. *Vorreiter*, 355 U. S. 15; *United States* v. *Ball Construction Co.*, 355 U. S. 587; *United States* v. *Hulley*, 358 U. S. 66.

[3] *Aquilino* v. *United States*, 363 U. S. 509, and *United States* v. *Durham Lumber Co.*, 363 U. S. 522, decided last Term, cite with approval this Court's earlier decisions concerning "the priority of competing liens asserted against the taxpayer's 'property' ", 363 U. S. at 514. *Aquilino* and *Durham* turn on the question whether the respective taxpayers had property interests in the funds to which the Federal Government had laid claim.

ciple of priority is firmly settled by decisions of this Court, and since the only other Court of Appeals' decision which deals with the precise factual situation presented here (*United States* v. *Christensen*, 269 F. 2d 624 (C. A. 9th)) is in full accord with the decision below,[4] there is no occasion for further review.

The mortgagee has also advanced a claim for an attorney's fee, incurred long after the attachment of the federal tax lien, paid for the attorney's services in seeking to establish the priority of the mortgagee's claim for reimbursement of local real estate taxes.[5] Obviously, this claim cannot rise higher than the principal claim to which it is ancillary.[6]

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[4] The decision of the Supreme Court of Wisconsin in *First National Bank of Chippewa Falls* v. *Charles Henneman Co.*, 10 Wis. 2d 260, petition for certiorari pending, No. 283, this Term, is also entirely consistent with the decision below. Such disagreement as persists is in lower state courts. See the Government's brief in opposition in No. 283, pages 6-7.

[5] This fee is discrete from the fees incurred in connection with the receivership and sale of the property, which were allowed without objection by the United States.

[6] Because of the failure of the United States to present the point in the District Court, the court below did not rely upon R.S. 3466 (*infra*, pp. 11-12), which in terms grants priority to the United States when the debtor is insolvent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1960.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1958 ed., Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1958 ed., Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) *With clerk of district court for District of Columbia.*—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) *Form of Notice.*—If the notice filed pursuant to subsection (a)(1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a)(2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) *Exception in Case of Securities.*—

* * * *

(26 U.S.C. 1958 ed., Sec. 6323.)

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the

estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 1958 ed., Sec. 191.)

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